



CENTRAL COUNCIL  
*Tlingit and Haida Indian Tribes of Alaska*  
Office of the President • Edward K. Thomas Building  
9097 Glacier Highway • Juneau, Alaska 99801

---

June 8, 2018

Hon. John Tahsuda  
Principal Deputy Assistant Secretary  
Indian Affairs  
Department of the Interior  
1849 C Street N.W.  
Washington, D.C. 20240  
*consultation@bia.gov*

**Re: Tribal Consultation Comments on the Land-Into-Trust Application Process**

Dear Principal Deputy Secretary Tahsuda:

On December 6, 2017, you sent a Dear Tribal Leaders Letter (“December 6 DTL Letter”), announcing a revised consultation schedule for the Department of the Interior’s (“Department”) land-into-trust regulations at 25 C.F.R. Part 151.<sup>1</sup> The December 6 DTL Letter listed a series of questions for tribal consultation. The Central Council of Tlingit and Haida Indian Tribes of Alaska (“Tlingit Haida”) appreciates the opportunity to submit these written comments in response to the Department’s questions regarding the land-into-trust regulations. The Tlingit Haida have seen first-hand the devastating impacts of land loss that resulted from the duplicity of the federal government and failed Indian policies. For the Tlingit Haida and other tribes, land restoration

---

<sup>1</sup> On October 4, 2017, the Department sent a Dear Tribal Leaders Letter (“October 4 DTL Letter”) with specific proposals to change the Part 151 regulations. Tribal leaders voiced concerns over the proposed changes in the October 4 DTL Letter at an initial tribal listening session held in Milwaukee, Wisconsin, because the changes were proposed without tribal input and included an expedited consultation schedule. Thereafter, the Department cancelled consultation over the proposed changes. Upon reinitiating consultation, the Department retracted the proposed changes to the Part 151 regulations and is now seeking instead to consult on specific questions related to the land-into-trust process. In comparing the initial proposed changes announced in October 2017, with the list of questions set out in the December 6 DTL Letter, the Department appears to be seeking input on the same issues raised in the October 2017 proposed changes. *Compare e.g.*, Consultation Draft, Part 151.11 (proposing off-reservation standards that distinguish between trust acquisitions for gaming and other uses), *available at* <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Consultation%20Draft%20-%20Trust%20Acquisition%20Revisions.pdf>, with December 6 DTL Letter Question 5(b) (asking if off-reservation gaming applications should be distinguished from non-gaming economic development).

through the land-into-trust process is a vital component of the future of tribal self-government and economic revitalization.

In our view, the current regulations should not be changed, as they allow the government to carry out the trust responsibility and provide an adequate opportunity to consider state and local interests before the Secretary makes a determination to take land into trust for an Indian tribe, regardless of whether the land is located on or off-reservation.<sup>2</sup> What is needed are not new regulations, but the allocation of appropriate resources and a proper recognition of the intent of Congress in the IRA and the importance of the land restoration process for tribes.

Below we address the ten questions posed in the December 6 DTL Letter.

**1. What should the objective of the land-into-trust program be? What should the Department be working to accomplish?**

The Department already recognizes that the land-into-trust program is critical to fostering greater tribal self-sufficiency and stronger tribal government. The Department places a significant emphasis on its role in helping tribes achieve this goal. Specifically, the Bureau of Indian Affairs (“BIA”) website states:

Taking land into trust is one of the most important functions Interior undertakes on behalf of the tribes. Acquisition of land in trust is essential to tribal self-determination. Tribes are sovereign governments and trust lands are a primary locus of tribal authority. Indeed, many federal programs and services are available only on reservations or trust lands. The current federal policy of tribal self-determination is built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act.

---

<sup>2</sup> These comments use the term “reservation” to mean any trust or restricted fee lands. In addition, “on-reservation” references refer to those land-into-trust acquisitions that are considered “on-reservation” under the existing Part 151 regulations, which includes applications within former reservations in Oklahoma.

<https://www.bia.gov/bia/ots/fee-to-trust>. Consistent with this policy, the Department should support tribes in restoring their homelands and ensure that the land-into-trust process actually helps tribes achieve this goal. The Department should not propose changes that would actively work against this goal.

The Department's land-into-trust regulations implement Section 5 of the Indian Reorganization Act ("IRA"),<sup>3</sup> which allows the Secretary to acquire land in trust for the benefit of Indian tribes or individual Indians. 25 U.S.C. § 5108. The IRA was enacted by Congress to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). In fact, at the time, Congress and the President saw the IRA as a means to not only end prior federal policies that had destroyed Indian communities and Indian economies but to reverse course completely. *See, e.g., Cass County v. Leech Lake Band*, 524 U.S. 103, 108 (1998) (noting that the IRA dramatically shifted federal Indian policy).

Prior to enactment of the IRA, federal policy was aimed at assimilating Indians and breaking up tribal land bases. As a result, tribes suffered devastating land losses during the allotment era. *See* Felix S. Cohen, *Handbook of Federal Indian Law* § 1.04 at 72 (2012 ed.) ("Cohen's Handbook"). Under the allotment era, the federal government mandated the allotment of Indian reservations to individual Indians, oftentimes opening up "surplus lands" (those lands not allotted to individual Indians) to non-Indians and leaving thousands of Indians homeless or living on the poorest of their former lands. *See* Cohen's Handbook, § 1.04 at 73-74 (Between 1887, when the General Allotment Act was enacted, and 1934, Indian land holdings were reduced

---

<sup>3</sup> 25 U.S.C. § 5101 *et seq.*

by 90 million acres, leaving only 48 million acres in Indian hands); Sen. Comm. On Indian Affairs Hrg. on S. 2755, 73d Cong., 2d Sess. at 30-31 (1934) (allotment further reduced the value of Indian lands by at least 85 percent, with the most valuable land passing to non-Indian ownership) (testimony of Commissioner Collier); *United States v. Celestine*, 215 U.S. 278, 290 (1909) (noting that the General Allotment Act was designed to “end tribal organization[s]” and “dealings with Indians . . . as tribes.”). The destruction of tribal economies, institutions, culture and communities followed directly from the decimation of the tribal land base. *See* Acquisition of Title to Land in Trust, 64 Fed. Reg. 17574, 17576 (1999) (citing Charles F. Wilkinson, *American Indians, Time and the Law* 19-21 (1987)).

The IRA marked a drastic change in federal-Indian relations and replaced the General Allotment Act’s assimilationist policy, which Congress recognized as a dismal failure. H.R., 73d Cong. 2d Sess., 78 Cong. Rec. 11, 427, 11727-28 (June 14-18, 1934) (“The cold fact of what has happened to the Indian and their lands under [the General Allotment Act] conclusively proves that allotment was a costly tragedy both to the Indians and to the Government”) (Statement of Rep. Howard, Chairman of the Committee on Indian Affairs). During introduction of the IRA in Congress, Commissioner Collier testified that

The Indians are continuing to lose ground; yet Government costs must increase . . . unless existing law [is] changed . . . . While being stripped of their property, these same Indians cumulatively have been disorganized as groups and pushed to a lower social level as individuals . . . . The disastrous condition peculiar to the Indian situation in the United States . . . is directly and inevitably the result of existing law – principally, but not exclusively, the allotment law and its amendments and its administrative complications.

Readjustment of Indian Affairs, Hearings Before the Committee on Indian Affairs, House of Reps. on H.R. 7902, 73d Cong., 2d Sess. at 15-16 (Feb. 22, 1934).

The IRA was enacted to correct these problems and help assure that Indian tribes have a solid territorial base by, among other things, “put[ting] a halt to the loss of tribal lands through allotment.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973); *see also id.* at 152 (explaining that the IRA was intended to “rehabilitate the Indian’s economic life,” and “give Indians control of their own affairs and their own property.” (quoting H.R. Rep. No. 1804, 73d Cong. 2d Sess., 6 (1934) and 78 Cong. Rec. 11,125 (1934) (Statement of Sen. Wheeler)). Restoration of land to tribal ownership was central to the overall purposes of the IRA. Congress consistently recognized that the restoration of tribal land bases by taking land into trust was essential to tribal self-determination. As Congressman Howard succinctly stated during the House consideration of the IRA, “[l]and reform and in [sic] a measure home rule for the Indians are the essential and basic features of this bill.” 78 Cong. Rec. at 11,729 (1934). The IRA contained a number of provisions to implement land reform. The IRA halted allotment, 25 U.S.C. § 5101, extended indefinitely the trust status of tribal and Indian land, 25 U.S.C. § 5102, and vested the Secretary of the Interior with broad authority to acquire lands and any interests in lands in trust for tribes and Indians, “within or without existing reservations,” *id.* § 5108, as well as authority “to proclaim new Indian reservations.” *Id.* § 5110.

In 1936, Congress expressly extended Section 5 of the IRA (and certain other sections) to Indians in the Territory of Alaska. Act of May 1, 1936, Pub. L. No. 74-538, 49 Stat. 1251 (codified at 25 U.S.C. § 473a). However, beginning in 1980 and until December 23, 2014, the Department’s Part 151 regulations included an “Alaska Exception,” which expressly stated that the regulations did not apply to the acquisition of lands in trust in the State of Alaska, except for the Metlakatla Indian Community of the Annette Island Reserve. *See Land Acquisitions in the State of Alaska,*

79 Fed. Reg. 76888, 76889 (Dec. 23, 2014). Since its inception, the Alaska Exception was heavily criticized, and federal litigation ensued challenging the Alaska exception. *See Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013).<sup>4</sup> In *Akiachak*, the district court of D.C. held that the Alaska Exception was not supported by law. After the district court's decision, the Department reexamined the Alaska Exception and engaged in a proposed rulemaking and tribal consultation to remove it as a bar to taking land-into-trust in Alaska. *See* 79 Fed. Reg. 24,648 (May 1, 2014). After considering comments and the history of the Alaska Exception, the Department issued a final rule on December 23, 2014, removing the Alaska Exception and confirming the Department's authority to acquire land in trust in Alaska under Section 5 of the IRA. It has only been three years since the Alaska Exception was removed from the Part 151 regulations and the Department has only approved one application for land-into-trust in Alaska. *See* Land Acquisitions; Craig Tribal Association, Craig, AK, 82 Fed. Reg. 4915 (Jan. 17, 2017).

Indian tribes continue to rebuild and restore lands lost due to allotment and other failed federal policies. And many tribes, including almost every tribe in Alaska, continue to have no tribal land base that is held in trust for their benefit. There simply cannot be any doubt that the policies and goals of the IRA have not been fully realized today—more than eighty years after its enactment. There continues to be a need for the Department to support and actively implement the land-into-trust program in a manner that is consistent with the IRA and *for the benefit of Indian tribes*. The Department should be working to accomplish this goal, rather than seeking to undermine the land-into-trust program.

---

<sup>4</sup> The D.C. Circuit later vacated the district court's decision after the Department issued its final rule removing the Alaska Exception. *See Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100 (D.C. Cir. 2016).

**2. How effectively does the Department address on-reservation land-into-trust applications?**

The current regulations provide sufficient standards to allow the Department to effectively and adequately balance state and local interests with the trust responsibility when evaluating land-into-trust applications (regardless of whether they are on- or off-reservation). For example, the BIA notifies state and local governments when an Indian tribe seeks to have land put into trust and provides them with the opportunity to submit comments on the tribe's land-into-trust application, including commenting on the potential impacts to state and local regulatory jurisdiction, real property taxes, and special assessments. 25 C.F.R. §§ 151.10; 151.11(d); *see also* Written Testimony of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior, before the Senate Committee on Indian Affairs, Oversight Hrg. on "Indian Gaming – The Next 25 Years" (July 23, 2014) ("state and local governments . . . have many opportunities to participate throughout the trust-acquisition process, [including] . . . during the environmental review process under the National Environmental Policy Act."). The regulations also require BIA to consider jurisdictional issues and any potential conflicts of land use that may arise in connection with the proposed trust acquisition. 25 C.F.R. §§ 151.10(e), (f); 151.11(a). At the same time, the BIA must also consider its authority to take land-into-trust, a tribe's need for additional land, the purposes for which it will be used and the ability of the BIA to carry out its trust responsibilities on any new trust land. *Id.* §§ 151.10(a)-(c), (g); 151.11(a). These considerations effectively allow BIA to consider concerns of state and local governments in the context of the paramount goals of the IRA (or other statutes enacted to allow tribes to acquire land in trust), which is intended to encourage the restoration of tribal homelands and secure a land base on which tribes can engage in economic development and realize self-determination.

The land-into-trust process also already takes adequate steps to provide reasonable notice to interested parties and the public of the decision to take land-into-trust. BIA provides written notice of its decision to acquire land-into-trust to all interested persons who make themselves known during the application process, as well as state and local governments. *Id.* § 151.12(d)(2)(ii). Additionally, since 2013, BIA has provided expanded notice of its decisions through newspaper publication. *Id.* at § 151.12(d)(2)(iii). This notice provides an adequate opportunity for interested parties to seek administrative or judicial review of a land-into-trust decisions.

The current regulations have also been amended recently to encourage prompt review of land-into-trust decisions to avoid lengthy delays in legal challenges. Prior to 2013, the Department imposed a 30-day administrative waiting period before it would acquire title in trust for the benefit of an Indian tribe after it made a positive decision to accept land-into-trust. *See* former 25 C.F.R. § 151.12 (2012); 78 Fed. Reg. 67928 (Nov. 13, 2013). The waiting period sought to ensure the opportunity for judicial review under the Administrative Procedures Act (“APA”) of positive land into trust determinations. If a positive decision was challenged, the Department would not acquire title until all litigation and appeals were resolved. The waiting period was necessary because, at the time, prevailing Federal court decisions found that the law precluded judicial review of the Department’s decision after the United States acquired title. *See, e.g., Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004); *Metro Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987); *Fla. Dep’t of Bus. Reg. v. Dep’t of the Interior*, 768 F.2d 1248 (11th Cir. 1985). However, in 2012, in *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that neither the Quiet Title Act, 28 U.S.C.



§ 2409a, nor federal sovereign immunity is a bar to APA challenges to the Secretary's decision to acquire land in trust after the United States acquires title to property in trust for the benefit of an Indian tribe, unless the party challenging the decision asserts an ownership interest in the land. After the Supreme Court's decision in *Patchak*, the Department published a proposed rule seeking to remove the 30-day waiting period, engaged in tribal consultation, and issued a final rule removing the waiting period. *See* 78 Fed. Reg. 32214 (May 29, 2013); 78 Fed. Reg. 67928 (Nov. 13, 2013). The final rule, among other things, also made clear that parties challenging trust acquisitions must exhaust administrative remedies. 78 Fed. Reg. at 67929. The 2013 final rule was a positive step for land-into-trust decisions and should not be changed.<sup>5</sup>

In short, the Department's current regulations should continue to be followed and fully implemented, with the understanding that the goal is to facilitate taking land into trust. Land-into-trust applications should not be delayed. Rather, the Department should actively and promptly process applications with the goal of promoting the restoration of tribal homelands.

**3. Under what circumstances should the Department approve or disapprove an off-reservation trust application?**

The IRA gives the Secretary authority to acquire land in trust "within or without existing reservations." 25 U.S.C. § 5108. To limit the Secretary's authority in a manner that mandates a specific outcome would be contrary to the broad authority granted under the IRA and inconsistent with the goals of the IRA to restore tribal homelands. Moreover, this question mistakenly assumes that all Indian tribes have reservations, which is not the case. Regardless, depending on the tribe's history and how federal policies impacted that tribe's land base, Indian tribes may need to acquire

---

<sup>5</sup> Reinstatement of the 30-day waiting period before taking land-into-trust was proposed in the October 2017 Consultation Draft § 151.12(c)(iii), available at <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Consultation%20Draft%20-%20Trust%20Acquisition%20Revisions.pdf>.

lands that are considered off-reservation for much needed economic development or to protect areas of cultural, historical or religious significance. Making arbitrary standards for approving or denying an off-reservation land acquisition would completely fail to account for the varied histories of Indian tribes—histories that are directly related to federal policies that were forced onto Indian tribes and repudiated by the IRA.

To the extent that the Department is concerned that the IRA and current regulations do not provide adequate standards for approving or denying land-into-trust acquisitions, such concerns are unfounded and an overwhelming majority of courts have held otherwise. Federal courts have concluded that the text, structure, and purpose of the IRA, as well as its legislative history, already sufficiently guide the discretion of the Secretary when deciding to take land-into-trust. *See, e.g., Mich. Gaming Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008), *cert. denied* 555 U.S. 1137 (2009); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 973-74 (10th Cir. 2005), *cert. denied* 549 U.S. 809 (2006). And in 2005, the Supreme Court positively acknowledged the broad power Congress bestowed on the Secretary under Section 5, stating

Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being. Title 25 U.S.C. [5108] authorizes the Secretary of the Interior to acquire land in trust for Indians[.]

*City of Sherrill v. Onedia Indian Nation of N.Y.*, 544 U.S. 197, 220-21 (2005). And with the exception of an Eighth Circuit decision, *South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), which was vacated by the Supreme Court, 519 U.S. 919 (1996), every court to consider the issue has upheld the constitutionality of Section 5 of the IRA in the face of legal challenges that it lacks standards. *See e.g., Mich. Gambling Opposition*, 525 F.3d at 30-33; *Carciari v. Kempthorne*, 497 F.3d 15, 22 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 397

(2009); *City of Yreka v. Salazar*, 2011 WL 2433660, at \*5-7 (E.D. Cal. June 14, 2011); *Cent. N.Y. Fair Bus. Ass'n v. Salazar*, 2010 WL 786526, at \*5 (N.D.N.Y. Mar. 1, 2010); *Sac & Fox Nation v. Kempthorne*, 2008 WL 4186890 (D. Kan. Sept. 10, 2008); *Sauk County v. U.S. Dep't of the Interior*, 2008 WL 2225680 (W.D. Wis. May 29, 2008).

Furthermore, any changes to the off-reservation land-into-trust regulations would disparately impact Indian tribes in Alaska. Out of the 567 federally recognized tribes in the United States, 266 tribes are located in Alaska. Even with the one land-into-trust application that was approved in 2017, with the exception of the Metlakatla Indian Community, there are no formally proclaimed reservations in Alaska. This means that, with the exception of Metlakatla, Indian tribes in Alaska must apply for trust lands under the off-reservation land-into-trust regulations.<sup>6</sup> And the need for land-in-trust in Alaska is significant. In 2013, the Report of the Indian Law and Order Commission, a bi-partisan commission established by Congress to investigate criminal justice systems in Indian Country, reported that “problems with safety in Tribal communities are severe across the United States—but they are systematically the worst in Alaska.” See [https://www.aisc.ucla.edu/iloc/report/files/Chapter\\_2\\_Alaska.pdf](https://www.aisc.ucla.edu/iloc/report/files/Chapter_2_Alaska.pdf). The report details various public issues facing Alaska Native communities, including high rates of domestic violence, suicide, and death from alcohol abuse, which disproportionately affect Native Alaskan women and children. *Id.* The Report concluded that allowing lands to be placed into trust in Alaska could be

---

<sup>6</sup> Although the Craig Tribal Association has been the only tribe that has successfully acquired land in trust in Alaska, the Tribe is located in a small community and has limited financial resources. The Tribe has been able to acquire another parcel of land in fee within Craig, Alaska, for a tribal housing project. However, given the limited availability of land in the area, it is not possible to acquire land contiguous to its current trust parcel. Thus, the Tribe’s pending application for the housing parcel will be evaluated by the Department under the off-reservation regulation requirements.

an important component of addressing the lack of law enforcement and public safety in Alaska Native communities, which are often remote and inaccessible by road.

Alaska Natives must be given the same opportunities that Indian tribes in the lower 48 states have to acquire land in trust and be given the opportunity to meaningfully govern their lands and their members. The Department should not make this process more difficult for Alaska Natives by changing the process now. Rather, the Department should be assisting Alaska Natives in navigating the current land-into-trust process in order to fully realize the goals of the IRA.

**4. What criteria should the Department consider when approving or disapproving an off-reservation trust application?**

The existing regulations provide adequate criteria for evaluating off-reservation trust applications. *See* 25 C.F.R. § 151.11. It is unclear whether the Department is asking a different question here than Question 3 above or is seeking to create criteria, as requested in Question 5 below, which would result in the denial of an off-reservation land-into-trust application. The questions appear to be similar and seek to limit the authority of the Secretary to approve off-reservation land-into-trust applications. For the reasons stated in response to Questions 3 and 5, no changes should be made to the existing regulations.

**5. Should different criteria and/or procedures be used in processing off-reservation applications based on:**

- a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings or Tribal health care, or Tribal housing)?**
- b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?**
- c. Whether the application involves no change in use?**

The current regulations already subject off-reservation land-into-trust applications to different criteria than on-reservation acquisitions and no more is needed. In addition to justifying

the need for the land and explaining the purposes for which the land will be used, if the off-reservation acquisition is for business purposes an Indian tribe is required to provide a “plan which specifies the anticipated economic benefits associated with the proposed use.” 25 C.F.R. § 151.11(a), (c). The regulations also subject off-reservation land-into-trust applications to greater scrutiny depending on the distance from the tribe’s existing reservation. *Id.* § 151.11(b). The Department should not create any additional criteria or procedures for evaluating land-into-trust applications based on the proposed use of the land, regardless of whether it constitutes a change in use.

Indian tribes need land for a variety of purposes and the need for the land shouldn’t be subject to an arbitrary categorization—by the federal government—of what uses are more important than others. To create such a hierarchy would be contrary to the purposes and goals of the IRA. In enacting the IRA, Congress sought to revitalize and strengthen the institutions of tribal government, *see Morton*, 417 U.S. at 543, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987), *Fisher v. District Court*, 424 U.S. 382, 387 (1976), and “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism” so that a “tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (citations omitted). These are all principles which have served as the foundation for federal Indian policy in the modern era of Tribal Self-Determination. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 & n. 10 (1980).

Moreover, while Indian tribes need land and resources to build sustainable tribal housing and run tribal government programs, land is also often need economic development before tribes can successfully achieve these goals. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (“[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases ‘may be the only means by which a tribe can raise revenues.’”) (internal quotation marks and citation omitted). Land for economic development can therefore sometimes be more important to tribal self-sufficiency and self-determination. Prioritizing land-into-trust applications based on the use of the land ignores the reality that all Indian tribes are different and seek to acquire land in trust for a variety of reasons depending on the needs of the tribe and its community.

Tribal needs also change over time. But Question 5(c) implies that the land-into-trust regulations should include a mechanism for taking land out of trust if a tribe seeks to change the use of its trust land—something the law does not permit. The Department should not, and cannot, create a land-into-trust system in which applications are weighed and differentiated based on uses deemed more or less important by the federal government.<sup>7</sup> As stated by Associate Deputy

---

<sup>7</sup> To the extent the Department is seeking to draw a distinction between land-into-trust applications for gaming and those for other purposes, whether an Indian tribe can acquire land in trust and whether an Indian tribe can engage in gaming on the land are two distinct legal inquiries. The Indian Gaming Regulatory Act (“IGRA”) controls issues related to Indian gaming, including whether land is eligible for gaming, and the IRA only address whether land can be taken into trust under Section 5. Congress made clear that nothing in the IGRA process could impact a tribe’s ability to take land into trust. *See* 25 U.S.C. § 2719(c) (“Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.”). The statutory and regulatory requirements related to gaming have no applicability and should not be added or collapsed into the land-into-trust process. Concerns regarding the expansiveness of Indian gaming as it relates to the land-into-trust process are also unfounded. As Associate Deputy Secretary Cason recently acknowledged, “the Department receives only a minor percentage of applications for gaming versus other applications.” Cason Testimony (July 13, 2017); *see also* Written Testimony of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior, before the Senate Committee on Indian Affairs, Oversight Hrg. on “Indian Gaming – The Next 25 Years” (July 23, 2014) (“Of the over 1,700 successful trust acquisitions . . . since . . . 2009, fewer than 15 were for gaming purposes and fewer were for off-reservation gaming purposes.”).

Secretary Cason, “Interior generally lacks the authority to restrict the use of trust lands as this would be an infringement upon tribal sovereignty and self-government.” Cason Testimony (July 13, 2017). Such system would also violate the Privileges and Immunities Act passed by Congress in 1994, which provides:

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) 1 as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. §§ 5123(f)-(g). The Department should have one goal—supporting tribes and their ability to become self-sufficient.

**6. What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?**

Without trust lands or the ability to restore tribal homelands that have been decimated by past failed federal policies, tribes cannot fully realize self-determination or self-governance. As the Supreme Court stated in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983):

The sovereignty retained by tribes includes ‘the power of regulating their internal and social relations.’ A tribe’s power to prescribe the conduct of tribal members has never been doubted, and our cases establish ‘absent governing Acts of Congress,’ a State may not act in a manner that ‘infringed on the right of reservation Indians to make their own laws and be ruled by them.’

(citations omitted). When an Indian tribe operates governmental programs and services or economic development enterprises necessary to support its citizens on fee lands, it does not have the same governmental autonomy and authority over its land base and members that it would have on trust lands. *Id.* at 332 (“Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a ‘historic immunity from state and local control’”) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)). When tribes hold land in trust, state law is generally not applicable to Indian affairs, absent the consent of Congress. *Worcester v. Georgia*, 31 U.S. 515, 562-63 (1832); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005) (state may not enforce its billboard regulations on trust land within Indian country).<sup>8</sup> Rather,

---

<sup>8</sup> Even in states like Alaska, where Public Law 280 applies to trust lands, state authority is limited and local governmental authority is not applicable to trust lands. In Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953), Congress delegated federal authority to five States to exercise criminal jurisdiction over most crimes and civil adjudicatory jurisdiction over private disputes in Indian country. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). Congress added Alaska as the sixth State (then a territory) in a 1958 amendment to Public Law 280. Pub. L. No. 85-615, 72 Stat. 545 (1958). However, it is important to recognize that it did not divest tribes of any authority they otherwise have. *See, e.g., Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560-62 (9th Cir. 1991) (noting that Public Law 280 “is not a divestiture statute” and concluding that it therefore did not divest tribes of concurrent authority to adjudicate child custody proceedings in the absence of Indian country); *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) (“Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority.”); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1200 (C.D. Cal. 1998) (holding Public Law 280 did not divest tribe of its inherent authority to establish a police force to enforce tribal criminal laws). As such, to the extent Public Law 280 states, like Alaska, were delegated jurisdiction over certain areas under Public Law 280, state and tribal jurisdiction are concurrent in those areas. With respect to municipal law, it must also be understood that Public Law 280 does not make local laws applicable to trust lands. *See, e.g., Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 659-64 (9th Cir. 1975); *United States v. Cnty. of Humboldt*, 615 F.2d 1260 (9th Cir. 1980) (rejecting application of local zoning laws and building codes); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212 n.11 (1987) (“it is doubtful that Pub. L. 280 authorizes the application of any local laws to Indian reservations,” but stating it was unnecessary to resolve the question). Rather, Public Law 280 applies to “State” criminal laws and “State” civil laws “that are of general application.” 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). The applicability of state civil laws to trust lands under Public Law 280 has been further limited by statute and the courts. For example, Public Law 280 expressly excepts from its grant of jurisdiction any state law that would permit “the alienation, encumbrance, or taxation” of trust property. *See* 18 U.S.C. § 1162(b); 25 U.S.C. §§ 1321(b), 1322(b); 28 U.S.C. § 1360(b). This precludes any assertion of state or local government taxing authority over trust property. Placing land-into-trust in Public Law 280 states will thus preserve and protect the land from future loss, ensuring that the particular tribe will have a permanent homeland for its people. In addition to this express exception, the Supreme Court has interpreted Public Law 280 to preclude the application of all state regulatory jurisdiction within Indian country. *See generally, Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).



land held in trust for the benefit of Indian tribes is generally only subject to tribal and applicable federal laws. Tribal laws vary from one tribe to another and allow Indian tribes to balance traditional and customary laws with modern laws in a manner that is best suited to a particular tribe. In addition, lands held in trust are not subject to state and local taxation and cannot be lost due to foreclosure. *See, e.g., Cass County*, 524 U.S. at 114 (explaining that Section 5 of the IRA, which grants the Secretary authority to take land into trust, also exempts the land from state and local taxation); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (concluding that “presumption against tax taxing authority applied to all Indian country, and not just formal reservations”).

Even today, most tribes lack an adequate tax base to generate government revenues and others have few opportunities for economic development. Trust acquisitions are critical to providing tribes with an additional land base to support economic development, including energy and natural resources development. *See e.g., Statement of James Cason, Acting Deputy Secretary, Department of the Interior, Before the House of Representatives Subcommittee on Indian, Insular and Alaska Native Affairs, “Comparing 21<sup>st</sup> Century Trust Land Acquisition with the Intent of the 73<sup>rd</sup> Congress in Section 5 of the IRA” (July 13, 2017) (“From energy development to agriculture, trust acquisitions provide tribes the flexibility to negotiate leases, create business opportunities, and identify the best possible means to use and sell available natural resources”)* (“Cason Testimony”).

Trust acquisitions also provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from tribal government to bolster local housing markets and provide job opportunities in order to offset

high rates of unemployment. Additionally, trust lands provide the greatest protections for many tribal communities who rely on subsistence activities, like hunting, fishing and gathering. *See id.* (“restoration of tribal land bases reconnects fractionated interests and provides protections for important tribal cultures, traditions, and histories”).

**7. Should pending applications be subject to new revisions if/when they are finalized?**

There is no need for any changes to the current land-into-trust regulations. However, if the Department decides to make changes despite strong tribal opposition, pending applications should not be subject to new revisions. All pending applications were submitted under the assumption that the current regulations would apply, and information was submitted based the requirements of the existing regulations. Subjecting pending applications to any new or different requirements would require tribes to expend additional resources to meet new requirements or amend pending applications. This would also result in additional processing delays.

**8. How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?**

The current regulations already provide an adequate opportunity for state and local jurisdictions, as well the public to weigh in on land-into-trust decisions. The Department must not confuse the procedural opportunity for state and local governments to be heard with respect to trust land decisions, with some broader, but wholly unfounded, notion that these third parties have a substantive right to prevail on the merits or to veto a land-into-trust decision.

The Department must recognize that the land-into-trust acquisition process is an important aspect of federal Indian policy. The Indian Commerce Clause vests the federal government with exclusive authority over Indian affairs. As Chief Justice John Marshall explained in the landmark

opinion in *Worcester v. Georgia*, 31 U.S. 515, 557 (1832), the Constitution, federal laws and treaties “provide that all intercourse” with the Indians “shall be carried on exclusively by the Government of the Union” and shall be “separated from . . . the States.” *See also United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876) (“Congress now has the exclusive and absolute power to regulate commerce with the Indian Tribes, a power as broad . . . as that to regulate commerce with foreign nations.”); *United States v. Mazurie*, 419 U.S. 544, 555-56 (1975); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). Thus, the law is well established that “[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.” *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

The broad grant of federal power in the Indian Commerce Clause also limits state authority. As the Supreme Court stated, “[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *McClanahan v. Arizona Tax Comm’r*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). The protections afforded to tribes under federal law have historically been aimed in large measure at protecting tribes from hostility from their non-Indian neighbors and the states. This was so at the time of the allotment policy. *See United States v. Kagama*, 118 U.S. 375, 383-84 (1886). And it remains true today, as “state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians.” *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974). *See also, Washington v. Washington State Commercial Passenger Fishing Ass’n*, 443 U.S. 658, 696 n. 36 (1979).

We urge the Department to keep this fundamental legal framework firmly in mind. Section 5 of the IRA is intended to reverse the wrongs of prior federal policies and to help revitalize tribal

self-government by taking land into trust for tribes. Indeed, it is not disputed that the Department should be informed regarding the concerns of state and local governments and others who may be affected by trust land decisions. But as discussed above, the current regulations already provide a process to take these concerns into account. The United States is duty bound to make its decisions based on the law, consistent with its trust responsibility to Indian tribes. State and local government concerns cannot change the law or the government's obligations as trustee. The IRA does not say that the Secretary may take land into trust for the tribes only if no one objects or only if there is a consensus on all issues. Rather, the IRA provides a clear policy in favor of taking land-into-trust as a mechanism for achieving the self-determination goals of the Act and ameliorating the harm done by the federal government in taking so much from the tribes throughout the history of the United States. The policy of Congress in the IRA – not the current political or other interests of state and local governments – must control the land-into-trust process.

**9. Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?**

MOUs can, in certain circumstances, help facilitate tribal, state and local relationships. However, MOUs are not always possible or appropriate. Any decision to enter into an MOU with state or local governments should be left to discretion of each Indian tribe. A tribe applying to have land placed in trust is required to identify the land and to provide adequate information to demonstrate that the trust land acquisition will further the broad policies of the IRA. Beyond this, a tribe should not be required to anticipate or address concerns that are often not even related to its trust acquisition by state and local governments. Many issues a state or local government may

want to include in an agreement will have no bearing on particular applications. For example, if a tribe is seeking to have land put into trust for a bison range, issues relating to sanitation, utility services and the like will simply not be pertinent. States and local governments could, however, refuse to enter into an MOU unless the tribe agrees to address all of these unrelated issues in an agreement for not just the land the tribe is seeking to acquire, but for all current or future trust lands – no matter what the nature of the trust land application.

Requiring these types of agreements would effectively provide state and local governments a veto power over all land-into-trust decisions. This would also allow state and local governments to improperly insist on making state and local laws applicable on trust land, absent any authorization from Congress for such an encroachment of state and local authority. Any such approach is simply inconsistent with the Constitutionally grounded role of the federal government over Indian affairs and the specific intent of Congress in Section 5 of the IRA. Furthermore, this question implicitly assumes that most land-into-trust applications are controversial and don't have the support of state and local governments. To the contrary, Associate Deputy Secretary Cason recently testified that “[o]verall, land into trust acquisitions are uncontested transfers that often have local support.” Cason Testimony (July 13, 2017).

**10. What recommendations would you make to streamline/improve the land-into-trust program?**

Any improvements to the land-into-trust program can be made at the policy level and do not require regulatory changes. The Department should ensure that all agency and regional offices have enough staff that are properly trained in the land-into-trust process to ensure that applications are processed and reviewed in a timely manner. Given the Department's current reorganization and staff reduction efforts, Indian Affairs and the current land-into-trust program must be

protected. The Department should make land-into-trust a priority in terms of both staffing resources and in its presidential budget requests.

The Department should also continue to support legislation to treat all federally recognized Indian tribes equally under the IRA and fix the Supreme Court's decision in *Carciere v. Salazar*, 555 U.S. 379 (2009). As a result of *Carciere*, the Department must make a fact and time intensive determination that a tribe was under federal jurisdiction on June 18, 1934, when the IRA was enacted. The *Carciere* decision is inconsistent with the United States' longstanding policy and practice to assist all federally recognized tribes in establishing and protecting a land base sufficient to allow them to provide for the health, welfare and safety of tribal members and in treating tribes alike regardless of their date of federal acknowledgment. See 25 U.S.C. § 1523(f)-(g).

### CONCLUSION

The land-into-trust process is important to Indian tribes and the Department has a duty to implement the IRA in a manner that is consistent with its trust responsibility. The current regulations provide transparent and effective criteria to adequately evaluate land-into-trust applications. No additional regulatory changes are needed to further implement the IRA. We appreciate the opportunity to provide these comments and respectfully request that the Department focus its effort on supporting the current land-into-trust program and not on future regulatory changes.

Sincerely,

[name]  
[position]